RECENT IMPORTANT DECISIONS

AGENCY—EVIDENCE OF PERFORMANCE—RIGHT TO COMPENSATION—ACTING FOR BOTH PARTIES.—Plaintiff's testator acted as agent of defendant under the following contract:

"NEIHART, December 1, 1899.

"Should I purchase the Broadwater group of mines and other property for the sum of fifty thousand dollars (and Charles S. Gibson assisting me in the making of said purchase) then in that event I agree to pay to the said Charles S. Gibson in return for the above assistance a commission of three thousand dollars at the time of delivery of deed of above property to me.

"I also agree to give him two one-hundredths (2/100) interest in the property in lieu thereof in the event of the incorporation of a company by me on the said property, to give him 2/100—two one-hundredths—of the capital stock of said company at the time of it's incorporation in lieu of the said two one-hundredths interest in the property. Said stock to be non-assessable stock.

"The above agreement to be void if I do not purchase the property at the price above stated.

L. S. MCLURE."

Unknown to defendant he was at the same time acting for the vendor. Shortly after death of testator, defendant purchased property in question. There was also testimony that defendant recognized plaintiff's right to compensation. Plaintiff brings suit for commissions in accordance with the contract. *Held.* 1. That the actual purchase of the property and the other evidence were sufficient, prima facie, to warrant a recovery. 2. That under the conditions he was simply acting as middleman and therefore could recover commissions from both parties. *McLure* v. *Luke* (1907), — C. C. A., 9th cir. —, 154 Fed. Rep. 647.

Upon the first proposition decided by the court there seems to be no question. *Lemon* v. *Lloyd,* 46 Mo. App. 452; *Shope* v. *Campbell,* 5 N. Y. Supp. 346; *Chapin* v. *Bridges,* 116 Mass. 105; *Gillen* v. *Wise,* 14 Daly 480. In respect to the second holding of the court the cases are not in such close accord. There is no doubt upon the general principle that an agent, acting as a mere middleman without any discretionary powers, can recover commissions from both parties, even though they have no knowledge of the fact that he is acting in a double capacity. MECHEM, AGENCY, § 67; *Hinckley* v. *Arey,* 27 Me. 362; *Scott* v. *Mann,* 36 Tex. 157; *Northrup* v. *Germania Fire Ins. Co.,* 48 Wis. 420, 33 Am. Rep. 815; *Rupp* v. *Sampson,* 16 Gray (Mass.), 398, 77 Am. Dec. 416; *Mullen* v. *Keetzleb,* 70 Ky. (7 Bush) 253; *Manders* v. *Craft,* 3 Colo. App. 236, 32 Pac. 836; *Knauss* v. *Brewing Co.,* 142 N. Y. 70, 36 N. E. 867. The question that does arise, and the one upon which the cases are somewhat divided, is what will establish the relationship of middleman between principal and agent. For cases holding that such a condition as exists in this case does not give rise to the relationship of middleman, and

that the agent cannot act for both parties, see the following: *Meyer* v. *Hanchett,* 43 Wis. 246; *Scribner* v. *Collar,* 40 Mich. 375, 29 Am. Rep. 541; *Farnsworth* v. *Hemmer,* 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Rice* v. *Wood,* 113 Mass. 133, 18 Am. Rep. 459; *Walker* v. *Osgood,* 98 Mass. 348; *Pugsley* v. *Murray,* 4 E. D. Smith 245; *Everhart* v. *Searle,* 71 Penn. St. 256; *Raisin* v. *Clark,* 41 Md. 158, 20 Am. Rep. 66. In all these cases the facts are closely related to those in the case under consideration, and still it was held in all of them that the agent could not recover. The following are some of the cases holding that such an agent was simply acting as middleman and consequently entitled to recover from both parties in spite of the fact that they did not know of his acting in a double capacity. *Rupp* v. *Sampson,* 16 Gray (Mass.) 398, 77 Am. Dec. 416; *Knauss* v. *Brewing Co.* supra; *Herman* v. *Martineau,* 1 Wis. 36, 60 Am. Dec. 368; *Alexander* v. *Northwestern, etc., University,* 57 Ind. 66. In these cases the agent was simply to do some particular act. In *Scribner* v. *Collar,* supra, speaking of such cases the court said: "No doubt such cases may occur; but their exceptional character should appear clearly before they should be exempted from the general principle;" and *Walker* v. *Osgood,* supra, goes still farther: "Even if he had no authority to bind his principal, and was entrusted with no discretion in fixing the terms of the exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him." Hence, in order to establish the relationship of middleman between the parties it must be affirmatively shown that the agent has no discretionary powers. This was hardly done in this case. One is inclined to agree with JUDGE ROSS, dissenting, when he says, "The effect of the decision, therefore, it seems to me, is that an agent may act for a vendor in the sale of his property, his duty to the vendor being to sell it at the highest price, and at the same time, without knowledge of either of the principals, act as agent for the purchaser, his duty to him being to buy at the lowest price. Yet the law is, as I understand it, and as is stated in the opinion, that this cannot be permitted."

ASSIGNMENT FOR BENEFIT OF CREDITORS—MARSHALING ASSETS.—The Tanners' Leather Company made a common law assignment for the benefit of creditors. Certain creditors held promissory notes of the company, which had been indorsed by two persons, one being the treasurer, who, after the company's assignment, assigned to trustees to secure the payment of the notes, a contract for the cutting of bark on certain lands. *Held,* that where final satisfaction from the proceeds of the assigned "bark contract" was uncertain, and would necessitate delay, the general creditors could not compel the holders of the notes to resort to the proceeds of the "bark contract" before taking a dividend from the estate of the maker of the notes. *Carter* v. *The Tanners' Leather Co. et al.* (1907), — Mass. —, 81 N. E. Rep. 902.

The rule which the general creditors sought to apply here is "that if a party has two funds, he shall not, by his election, disappoint another who has one fund only, but the latter shall stand in the place of the former, or compel the former to resort to that fund which can be affected by him only. *Cheese-*